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No. 92-359

In The

Supreme Court of the United States

October Term, 1992

KEENE CORPORATION,

Petitioner,

v.

LEONARD ADAMS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Circuit Court Of Monongalia County, West Virginia

RESPONSE TO SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Keene Corporation ("Keene") has filed a Supplemental Brief in Support of Petition for a Writ of Certiorari based upon the recent decision of the Third Circuit Court of Appeals in *Dunn v. Hovic*, No. 91-3837 (3d Cir. Sept. 18, 1992). Keene cites the dissent in *Dunn* as support for its argument that punitive damages should be struck from all asbestos cases.

In *Dunn*, the jury awarded the asbestos plaintiff $1.3 million in compensatory damages and $25 million in punitive damages following a trial against a single defendant, which was remitted to $500,000 in compensatory damages and $2 million in punitives. The majority in *Dunn* affirmed the judgment for many of the same reasons that Respondents cite to urge this Court to deny Keene's Petition for a Writ of Certiorari.

The Court of Appeals in *Dunn* recognized the sufficiency of the evidence under Virgin Islands law (Sa 37 - Sa 48), and refused to find error in the jury instructions where the defendant proffered only a general supplemental instruction, made a general objection and failed to specifically inform the court how to provide clearer standards. (Sa 55 - Sa 62). Similarly here, Petitioner does not complain about the sufficiency of the evidence or about error in the instructions, and this Court must assume that the evidence was sufficient under West Virginia law to support an award of punitive damages and that the trial court correctly charged the jury on punitive damages.

The *Dunn* court also recognized that appellate courts have affirmed punitive damage awards involving comparable ratios of compensatories to punitives, and found

that the large punitive damage award should be affirmed if remitted. In the case *sub judice,* punitive damages of $5,000 per plaintiff, when the compensatory damages ranged from $15,000 to $324,000, can hardly be regarded as tainted by passion and prejudice. Indeed, given the much larger awards in cases that this Court has refused to review, such as a total of $6.1 million in punitive damages awarded to eleven plaintiffs in *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991), *cert. denied sub nom. Celotex Corp. v. Glasscock*, 112 S. Ct. 1778 (1992), an award of $105,000 to twenty-one plaintiffs is nominal.

The *Dunn* majority's consideration of successive punitive damage awards in asbestos cases is particularly relevant to the arguments raised by Keene in its Petition. First, the Third Circuit recognized that the legislature and not the judiciary is the appropriate forum for determining whether successive claims of punitive damages for multiple personal injuries should be allowed. (Sa 89 - Sa 90). A court adjudicating an individual case is not the appropriate body to resolve the conflicting policy arguments. (Sa 92).

Second, the Third Circuit was not persuaded by the defendant's claims that punitive damages in asbestos cases are as a general matter unconstitutional. The Court of Appeals recognized that the commentary calling for abolition of punitive damages recited by the defendant could be countered with an impressive array of empirical studies concluding that both the frequency and size of punitive damage awards is much less than generally believed. (Sa 93 - Sa 96). Moreover, the defendant in *Dunn* "failed to submit evidence concerning the actual amount it or other asbestos manufacturers have actually paid to

satisfy punitive damages verdicts and simply has not made a 'showing that the total [amount of punitive damages assessed so far] is even close to whatever limit due process might impose on the total punitive damages that may be assessed . . . for . . . misconduct with respect to asbestos warnings.' " (Sa 97) (quoting *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2d Cir.), *cert. dismissed*, 111 S. Ct. 27 (1991)). The *Dunn* majority properly rejected the defendant's attempt to create its factual record for the first time in the appellate court. Keene, too, made no factual record in the lower court as to the nature and extent of any punitive awards.

The *Dunn* court noted that although the costs associated with asbestos litigation may have wiped out any profits defendant made from the sale of its asbestos products, the defendant failed to submit evidence at trial concerning the profitability of its own asbestos products or those of other manufacturers. "In any event, neither Virgin Islands law nor due process requires striking all punitive damage claims simply because the harm caused by a defective product was so severe as to wipe out all profit." (Sa 99).

Respondents' discussion in their Response to Keene's Petition for a Writ of Certiorari tracks this analysis. Keene, like the defendant in *Dunn*, seeks to have an appellate court review factual information, raised for the first time in its petition to this Court, that it never proffered for consideration by the jury, despite being afforded the opportunity to do so. Like the Third Circuit, this Court cannot be transformed into a fact finding body in

cases involving punitive damages in asbestos cases, particularly where the evidence of egregious conduct affecting vast numbers of victims is so overwhelming.

The arguments of the dissenting judge in *Dunn* are premised on his belief that punitive damages are a windfall to plaintiffs. (Sa 109). These arguments have no relevance to the instant case in which twenty-one plaintiffs were each awarded a nominal $5,000 in punitive damages. The jury awarded to each of these plaintiffs compensatory damages in an amount of more than $5,000, but many of these compensatory awards were not paid because of plaintiffs' fortuitous settlements with others. Certainly there was no windfall to Respondents.

Moreover, Judge Weis's suggestion that a panel of judges deciding an individual case is institutionally competent to bind all asbestos plaintiffs, without recognizing any need for a class certification proceeding or other type of proceeding establishing that all victims can be bound by such a determination and without requiring a determination that there exists a limited fund, emasculates all notions of due process as established by this Court as recently as *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).[1]

The "business of federal courts [is limited] to 'questions presented in an adversary context and in a form historically viewed as capable of resolution through the

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[1] To hold that asbestos plaintiffs are prohibited from recovering punitive damages may also raise substantive due process and equal protection problems. *See, e.g., Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968).

judicial process . . . to assure that the federal courts will not intrude into areas committed to the other branches of government.' " *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395-96 (1980) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). Certainly, this Court should not be persuaded to legislate a "broader view," to assume a role that is constitutionally proscribed by the doctrine of separation of powers or to intrude in a process that it has previously recognized is traditionally the province of state law.

CONCLUSION

Accordingly, for the reasons set forth in the Response to Petition for a Writ of Certiorari and those set forth above, Keene's Petition of a Writ of Certiorari must be denied.

Respectfully submitted,

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